Field 2/22/11 Shaw v. Longs Drub Stores California CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TISHA GENICE SHAW, Plaintiff and Appellant, v. LONGS DRUG STORES CALIFORNIA, INC., et al., Defendants and Respondents.	B222567 (Los Angeles County Super. Ct. No. BC396832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Affirmed in part, reversed in part and remanded with directions.

Employment Lawyers Group, Karl Gerber and Ann Guleser for Plaintiff and Appellant.

Filice, Brown, Eassa & McLeod, Robert D. Eassa and Delia A. Isvoranu for Defendants and Respondents.

California's Fair Employment and Housing Act (FEHA)[1] prohibits an employer from sexually harassing an employee (Gov. Code, §§ 12940, subds. (a) & (j)(1)). Our courts recognize two theories of sexual harassment under the FEHA—"quid pro quo" and "hostile work environment." (E.g., *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 141 (*Mokler*).) This appeal concerns the latter, which occurs where the harassment is so pervasive that it alters the conditions of employment and creates an abusive work environment. (*Id.* at p. 142; *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 149.) As we explain, a triable issue of fact exists as to whether the employer created a hostile work environment under the FEHA when a direct supervisor makes four unwanted verbal advances of a sexual nature and makes an unwanted physical contact, all within a three- to four-month period at the workplace.

Plaintiff and appellant Tisha Genice Shaw appeals the granting of summary adjudication as to her claims of sexual harassment, sexual discrimination by retaliation, and intentional infliction of emotional distress, which alleged punitive damages as to her employer, Longs Drug Stores California, Inc., and her supervisor, Kevin Wendell Clark, defendants and respondents in this appeal. In her timely appeal, Shaw contends the trial court's summary adjudication rulings were erroneous. As we explain, the court erred in finding no triable issue of fact as to Shaw's sexual harassment claim under the FEHA, as well as for her entitlement to punitive damages. We therefore affirm in part, reverse in part, and remand with instructions.

UNDISPUTED FACTS IN THE SUMMARY ADJDUDICATION MOTION

In February 2006, Longs hired Shaw as a cashier at their store in Glendale, where Clark was the store manager and Shaw's immediate supervisor. She was later promoted to a file maintenance clerk position. While working at the store in September 2007, Clark asked Shaw, "Have you ever been donkey punched?" The comment made her

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1 Government Code section 12900 et seq.

uncomfortable because of the accompanying gesture he used and the way he said it. She did not know what he meant at that time and assumed he was referring to a violent act. Shortly thereafter, however, she asked her sister Tara about the term. Tara told her the phrase had a sexual connotation and referred to a sexual position. In a declaration, filed in opposition to the summary adjudication motion, Shaw stated that within a few days of Clark's comment, Tara explained to her that "donkey punched" described an act of anal sex by tackle or force, involving violence. As a result, Shaw became angry and felt humiliated and degraded by Clark's comment.

Later that month, while working at the store, Clark asked her, "Have you ever been hit in the neck?" She understood the question in its literal sense and was concerned it meant something violent because Clark used a punching gesture. However, she again asked Tara what the phrase meant and was told it referred to an act of oral sex. Shaw felt humiliated and degraded by her supervisor's obscene comments. She complained about Clark's statements to Jonathan Harvey, a field human resources advisor for Longs.

Also in September, while at work, Clark asked Shaw, "Can you drink a two-liter really fast?" Because of his manner of speaking and body language, Shaw believed Clark was making a sexual reference, which she did not understand. Clark laughed at her and would not tell her what he meant. She asked a coworker, who said the "two-liter" was a reference to Clark's penis. Shaw complained to Harvey. That same month, while Shaw was working, Clark told her, "You look like a missionary type of person." When she complained to Harvey about the statement, he said he "would look into it."

In late October, while in the store, Clark showed Shaw a box for one of the store's products, a personal massager. The box depicted a smiling woman wrapped in a towel. Clark, referring to the woman, told Shaw, "I bet you she is happy." Shaw found the comment offensively sexual in light of Clark's previous sexual comments and the facts that the woman was "half-dressed" and the massager was similar to a vibrator. In December, while Shaw was at work, Clark "brush[ed] up against her" from behind and slapped the back of her thigh.

Shaw's complaints did not result in any disciplinary action against Clark. In response to her complaints, Harvey interviewed Clark, who denied making any of the statements she attributed to him. Harvey was not aware of any similar complaints by other employees about Clark. Unable to confirm Shaw's allegations, Harvey could not determine whether Clark acted inappropriately. He offered Shaw the option of "taking some time off" or being transferred to another Longs store. She responded that she did not need time off and preferred to work at the Glendale store.

In deposition testimony, Shaw stated that she also complained about Clark's behavior to Brian Godlasky, a Longs district manager, in January 2008. Godlasky accused Shaw of being "like the girl crying wolf" and told her that conduct did not amount to sexual harassment unless it was "physical." According to Godlasky, however, he met with Shaw sometime in 2008, concerning her job-related complaints about Clark—but she did not mention sexual harassment. Harvey had not informed him of any such concerns regarding Clark.

According to Harvey, Longs terminated Clark's employment in July 2008 for unsatisfactory job performance unrelated to Shaw's allegations of sex harassment. Shaw continued to work at the Glendale store until January 2009, when the store was closed. She accepted the company's offer to work at a different Longs store in Los Angeles.

THE SUMMARY JUDGMENT/ADJUDICATION MOTION

Shaw's complaint against Longs and Clark alleged battery, assault, sexual harassment (Gov. Code, § 12940, subd. (j)), sexual discrimination by retaliating against her for reporting the harassment (Gov. Code, § 12940, subd. (h)), and intentional infliction of emotional distress. Defendants moved alternatively for summary judgment and summary adjudication as to each of the claims, including Shaw's punitive damages remedy. The trial court granted the summary adjudication motion for all causes of action except battery and assault. Shaw dismissed the remaining causes of action and judgment was entered in favor of Longs and Clark.

DISCUSSION

The Sexual Harassment Claim

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "The moving party bears the burden to demonstrate 'that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.' [Citation.] If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment 'to make [its own] prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

We review summary judgment orders de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) "In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. As such, we will strictly scrutinize the moving party's papers, but the declarations of the party opposing summary judgment will be liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. Although we must review a summary judgment motion by the same standards as the trial court, we must independently determine as a matter of law the construction and effect of the facts presented." (*Dominguez v. Washington Mut. Bank* (2008) 168 Cal.App.4th 714, 719-720; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 963.)

The substantive law is well established. "An employer who sexually harasses an employee can be liable for damages under both federal law (title VII of the Civil Rights Act of 1964 (Title VII)) and California law . . . [(FEHA)] when the sexually harassing

conduct is so *pervasive* or *severe* that it alters the conditions of employment." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1038 (*Hughes*).) "Title VII treats sexual harassment as another form of sex discrimination." (*Id.* at p. 1041.) "'"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."'" (*Id.* at pp. 1040-1041, quoting *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67.)

Similarly, under the FEHA, "the prohibited conduct ranges from expressly or impliedly conditioning employment benefits on submission to, or tolerance of, unwelcome sexual advances to the creation of a work environment that is 'hostile or abusive to employees because of their sex.'" (*Hughes, supra,* 46 Cal.4th at pp. 1042-1043, quoting *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) As with a Title VII action, "the hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe.*" (*Hughes, supra,* at p. 1043.) "To prevail on a hostile work environment claim under California's FEHA, an employee must show that the harassing conduct was 'severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.' [Citations.] There is no recovery 'for harassment that is occasional, isolated, sporadic, or trivial.' [Citation.]." (*Ibid.*)

This inquiry is necessarily fact-intensive. "Under California's FEHA, as under the federal law's Title VII, the existence of a hostile work environment depends upon 'the totality of the circumstances.' [Citation.]" (*Hughes, supra,* 46 Cal.4th at p. 1044.) This determination involves an objective and subjective assessment: "'[t]o be actionable, "a sexually objectionable environment must be both objectively and subjectively offensive . . . ."' Therefore, 'a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . . if a reasonable person . . . , considering all the circumstances, would not share the same perception.' [Citation.]" (*Ibid.*) Among the relevant factors

bearing on the totality of the circumstances are: "'(1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. [Citation.]" (*Mokler, supra,* 157 Cal.App.4th at p. 142, quoting *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.)

Here, contrary to defendants' assertions and the trial court's determination, Clark's repeated unwelcome sexual comments over a three- to four-month period, capped off with his unwelcome slap to the back of Shaw's thigh, is sufficient to create a triable issue of fact as to hostile work environment sexual harassment. Viewed both objectively and subjectively, it cannot be said that as a matter of law that such conduct must be considered "'occasional, isolated, sporadic, or trivial.'" (See *Hughes, supra,* 46 Cal.4th at p. 1043.) Liberally construing Shaw's evidence, as we must, her evidence showed a pattern of unwelcome sexual taunts that included coarse references to forcible anal sex, along with two gross references to oral sex. Clark not only persisted in making the sexual comments over an extended period of time, but also slapped Shaw in a manner that could reasonably be understood as an unwanted sexual advance. Shaw presented evidence she found the conduct to be sexually offensive, degrading, and humiliating. If believed by the trier of fact, her evidence would support a finding that her perception was objectively unreasonable.

Moreover, in assessing the seriousness of Clark's conduct, it must be understood in the context of his status as Shaw's direct supervisor. As our colleagues in Division Six explain in an analogous case involving racial discrimination under the FEHA and title VII, where the offender is a supervisor (rather than a coworker), the conduct is generally deemed more serious: "In many cases, a single offensive act by a co-employee is not enough to establish employer liability for a hostile work environment. But where that act is committed by a supervisor, the result may be different." (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36 (*Dee*).) The *Dee* court noted that in

Brooks v. City of San Mateo (9th Cir. 2000) 229 F.3d 917, 927, footnote 9, the federal appellate court reasoned that "'a sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim'" (*Dee*, *supra*, at p. 36), and in *Rodgers v. Western-Southern Life Ins. Co*. (7th Cir. 1993) 12 F.3d 668, 675), the federal appellate court held that "a single racial slur by a supervisor may also create a hostile work environment." (*Dee*, *supra*, at p. 36.) Thus, in *Dee*, a supervisor's single racial slur was sufficient to withstand summary judgment on her FEHA claim, where the supervisor had also instructed the employee to lie, used foul language to her, and berated her in the workplace. (*Id.* at pp. 36-37.)

Defendants attempt to minimize Clark's five statements, asserting they cannot be deemed sexual because Shaw did not initially understand the sexual connotations and because it is speculative whether Clark intended anything beyond the literal meaning of his comments. Neither approach, however, is consistent with the one mandated by the governing standard of review, which requires us to "strictly scrutinize the moving party's papers" and liberally construe the declarations of the party opposing summary judgment, resolving "[a]ll doubts as to whether any material, triable issues of fact exist . . . in favor of the party opposing summary judgment." (*Dominguez v. Washington Mut. Bank, supra,* 168 Cal.App.4th at p. 720.) The fact that Shaw did not contemporaneously perceive the sexual implications of the phrases "donkey punched" and "hit in the neck," did not mean they cannot be considered sexual for the FEHA purposes. Even when made, the comments seemed violent and upsetting to her, and she discovered the sexual meanings shortly thereafter, causing her to complain of sexual harassment.

Nevertheless, invoking the rule that "[a]dmissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment" (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613), defendants argue that Shaw's and Tara's declaration testimony concerning the discovery of the sexual connotations of those phrases cannot be

considered because it is inconsistent with Shaw's deposition testimony.[2] That rule, however, applies only where the subsequently filed declaration presents a clear contradiction of an unambiguous admission. (See, e.g., *D'Amico v. Board of Medical Examiners* (1974)11 Cal.3d 1, 21; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573-574; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482.)

Here, when deposed and asked by defense counsel about Tara's response concerning the donkey punch reference, Shaw said her sister told her it referred to a "sexual position." In her declaration, Shaw added the additional description that the act involved forcible anal sex. We perceive no contradiction. Rather, the deposition testimony amounts to an elaboration consistent with the prior testimony. Nor do defendants identify any other clear contradictions between Shaw's deposition testimony and the declarations. Moreover, applying the required standard of review, the comments about drinking the "two-liter," Shaw's being a "missionary type of person," and the comment about the personal massager could all have reasonably been understood as having sexual connotations. Once again, it is for the trier of fact to determine whether Clark intended the statements to be understood literally, as mere references to soft drinks, religious vocations, and relief of muscle discomfort. "Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." (*Howard v. Burns Bros., Inc.* (8th Cir. 1998) 149 F.3d 835, 840 (*Howard*).)

Relying on *Hughes, supra,* 46 Cal.4th 1035, defendants argue the conduct Shaw describes was not "severe" or "pervasive" for the FEHA purposes. That decision, however, concerned a materially distinguishable set of circumstances. The defendant in *Hughes* was not the plaintiff's supervisor or employer, but the trustee of the estate of the plaintiff's deceased husband. Further, the abusive conduct occurred on the same day, in a

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[2] Longs argues Tara's declaration testimony cannot be considered because it amounts to hearsay evidence, an objection made below, but not ruled on. We agree with Shaw that the testimony was admissible not for its truth, but to corroborate Shaw's testimony concerning Shaw's conduct and understanding.

telephone conversation and, later, when the trustee made a "vulgar and highly offensive" remark made in the presence of the plaintiff and other persons attending the same private museum showing. (*Id.* at pp. 1048-1049.) As we have pointed out, in contrast, Shaw presented evidence of multiple vulgar and offensive statements over a three- to four-month period, along with an act of unwanted touching, all by her direct supervisor in the workplace.

The appellate decision in *Mokler, supra,* 157 Cal.App.4th 121 is similarly distinguishable. There, although the allegations of abuse concerned statements by a person in a quasi-supervisory role, none of the three statements over a five-week period was grossly or overtly sexual, and there was no evidence of unwanted touching. (*Id.* at p. 144.) Accordingly, given the substantial differences in the extensiveness and gravity of the conduct Shaw described, it is for the trier of fact to determine whether Clark's behavior was abusive or merely "boorish." (See *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 163 [conditions of employment became abusive when coworker used a threatening gesture toward plaintiff after the coworker's repeated romantic propositions were rebuffed].)

As an additional aspect of her FEHA claim, Shaw alleged Longs was liable for sexual harassment because it failed to conduct an adequate investigation into her complaints about Clark and failed to take adequate disciplinary measures against him to prevent future acts of harassment.[3] The FEHA makes it unlawful "[f]or an employer . . .

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[3] Under the FEHA, an employer is liable for harassment by a supervisory employee without regard to whether the employer knew of the harassing conduct or attempted to remedy the situation. (*Kelly-Zurian v. Wohl Shoe Company, Inc.* (1994) 22 Cal.App.4th 397, 419, citing a prior version of the statute; *California Fair Employment and Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1015 ["A supervisor is the employer's agent for purposes of vicarious liability for unlawful discrimination"].) Government Code section 12940, subdivision (j)(3) provides: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).) "The employer's duty to prevent harassment and discrimination is affirmative and mandatory. (*Id.*, § 12940, subds. (j)(1) & (k).) Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035-1036.) "However, initiating an investigation . . . cannot be the only step taken. An employer is required to take remedial action designed to stop the harassment, even where a complaint is uncorroborated or where the coworker denies the harassment." (*Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1631 (*Bradley*).)

In asserting summary judgment was mandated based on Harvey's testimony as to the reasonableness of his investigation, which failed to corroborate Shaw's allegations of sexual harassment, Longs overlooks this latter point—no remedial efforts were taken pending the investigation. Clark was not admonished in any way and, according to Shaw's testimony, his abusive conduct continued. At the summary judgment stage, Longs "cannot rest on its complex investigation process since the statute mandates remedial action designed to *end* the harassment." (*Bradley*, *supra,* 158 Cal.App.4th at p. 1634, citing *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 806 [antidiscrimination statute's primary objective is not to provide redress but to avoid harm].) As in *Bradley*, the employer "may not wait to act until it decides whether the complaint is valid. (*Hope v. California Youth Authority* [(2005)] 134 Cal.App.4th [577,] 594 [agency did too little when it failed to stop harassment because alleged perpetrator denied it]; *Hathaway v. Runyon* [(8th Cir. 1997)] 132 F.3d [1214,] 1224 [employer may be required to take remedial action even when harassment is not corroborated].)" (*Bradley*, *supra,* at p. 1634.)

As the standard is reasonableness under the circumstances, it may well turn out Longs efforts are ultimately found adequate. "[T]he employer will insulate itself from Title VII liability if it acts reasonably. Obviously, the employer can act reasonably, yet

reach a mistaken conclusion as to whether the accused employee actually committed harassment." (*Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1196 (*Swenson*).) "The requirement of a reasonable investigation does not include a requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser. . . . The employer is not required to credit the statements on the she-said side absent circumstances indicating that it would be unreasonable not to do so." (*Baldwin v. Blue Cross/Blue Shield* (11th Cir. 2007) 480 F.3d 1287, 1303-1304.) Nevertheless, "[w]here the employer sees hostility but cannot tell if there has been harassment, warning the alleged harasser, requiring both parties to participate in counseling, and monitoring their interactions is a proper and adequate remedy, at least as a first step." (*Id.* at p. 1306.) Longs's reliance on the *Swenson* decision is therefore unavailing. There, despite the employer's conclusion that a formal harassment charge could not be pursued, the employer took remedial steps appropriate to the allegations. (*Swenson, supra,* 271 F.3d at pp. 1193-94.)

The Claim for Retaliatory Sexual Discrimination

Shaw contends Longs illegally retaliated against her for complaining about Clark's harassing conduct. Under the FEHA, it is an "unlawful employment practice" for "any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) "If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the employer took its actions for a legitimate, nondiscriminatory reason. (*Guz* [*v. Bechtel National, Inc*. (2000)] 24 Cal.4th [317,] 355-356.) If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other

evidence of a discriminatory motive." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.)

Here, as the trial court determined, there was insufficient evidence of retaliation: Shaw was neither terminated nor demoted; she was never denied a promotion for which she was qualified; and she was promoted once and offered another promotion. The only potentially tangible, nonspeculative assertion of retaliation was her claim that following her complaints, Longs failed to provide her with adequate backup support when she took time off from work. As Longs points out and the court found, however, Longs presented evidence that it typically did provide her with backup support and any failure in that regard was due to budgetary constraints. As Shaw failed to respond with evidence to support a reasonable inference that Longs's explanation was pretextual or offer other evidence of a discriminatory motive, summary adjudication was appropriate.

Intentional Infliction of Emotional Distress

Shaw argues the trial court improperly granted summary adjudication of her claim for intentional infliction of emotional distress, based on the same facts supporting her discrimination and harassment claims. The argument fails because, as the court found, Shaw presented no evidence of an essential element of that claim—the suffering of severe emotional distress.

A cause of action for intentional infliction of emotional distress contains three elements: First, extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; second, suffering by the plaintiff of severe or extreme emotional distress; and third, actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (E.g., *Hughes*, *supra*, 46 Cal.4th at p. 1051.) Respecting the severe emotional distress requirement, our Supreme Court "has set a high bar. 'Severe emotional distress means "'emotional distress of such substantial quality or

enduring quality that no reasonable [person] in civilized society should be expected to endure it.'"' [Citation.]" (*Ibid.*)

Shaw's allegations of emotional distress are materially indistinguishable from those the *Hughes* court ruled inadequate. "[P]laintiff's assertions that she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments to her . . . do not comprise" severe emotional distress for purposes of this cause of action. (*Hughes, supra*, 46 Cal.4th at p. 1051.)

Punitive Damages

Shaw seeks punitive damages against Longs as Clark's employer, alleging Longs authorized and ratified Clark's acts of sexual harassment through an employee acting as a managing agent. The trial court granted summary adjudication as to the availability of punitive damages, however, finding as a matter of law that neither Clark, Harvey, nor Godlasky qualified as managing agents under California's decisional law.

As the parties acknowledge, the FEHA does not provide for punitive damages against Longs based on Clark's conduct. "Although [Government Code] section 12940, subdivision (h)(1), makes an employer liable for harassment by a supervisory employee irrespective of the employer's lack of knowledge or the employer's attempts to remedy the situation, the statute is not authority for the proposition the employer also is strictly liable for *punitive* damages for a supervisor's conduct." (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 419.) Rather, "[t]he applicable statute is Civil Code section 3294, subdivision (b)." (*Ibid.*) That provision "states in relevant part: '*An employer shall not be liable for [punitive] damages* pursuant to subdivision (a), based upon acts of an employee of the employer, *unless the employer* had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or *was personally guilty of oppression, fraud or malice.* With

respect to a corporate employer, the advance knowledge and conscious disregard, authorization or *act of oppression, fraud or malice* must be on the part of an officer, director, *or managing agent* of the corporation.' (Italics added.)" (*Ibid.*)

Shaw contends the trial court erred in finding no triable issue of fact as to either Harvey's or Godlasky's status as a managing agent for purposes of liability for punitive damages. In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567 (*White*), our Supreme Court held that "the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." Whether an employee is a managing agent does not hinge solely on his level or position in the corporate hierarchy. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822 (*Egan*).) "'Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.'" (*Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal.App.4th at p. 421, quoting *Egan, supra,* at pp. 822-823.)

Shaw presented evidence that she complained about Clark's improper behavior to district manager Godlasky in January 2008. Godlasky accused Shaw of "crying wolf" and told her that conduct did not amount to sexual harassment unless it was "physical." In his deposition testimony, however, Godlasky testified that when he met with Shaw sometime in 2008 concerning her complaints about Clark, she did not complain about sexual harassment. Nor had Harvey notified him of any such concerns regarding Clark.

Regarding the scope of his managerial authority, Godlasky testified that he became a district manager for Longs on January 3, 2007. He was responsible for approximately 25 stores in Los Angeles, the San Gabriel Valley, Riverside, and Las Vegas. His responsibilities extended to every aspect of the stores' day-to-day operations—"the entire operation of the retail store, for the front store and the pharmacy, and that's everything from customer service to training to doing the processes, getting the product on the shelf, getting the customers out the door with a smile on their face[s]."

There were approximately 800 to 1,000 employees in his district. Godlasky reported to a regional vice-president in San Diego. He did not have the sole authority to terminate an employee. Such decisions would ultimately be made by a committee, but he would have "some involvement" in the process. He could recommend, but not authorize, the remodeling of a store.

With regard to Harvey, as Longs points out, Shaw presents no evidence that he exercised substantial independent authority and judgment in corporate decisionmaking. Instead, she merely points to his involvement in the Clark investigation. In his declaration, Harvey, who is not a manager, had no authority to "independently hire or terminate any employee, and lacked discretion and authority concerning company policies and procedures." It follows that the trial court was correct in finding no triable issue as to Harvey's status as a managing agent for purposes of imposing punitive damages. (See *Kelly-Zurian v. Wohl Shoe Co.*, *supra*, 22 Cal.App.4th at p. 422.)

The lower court's finding concerning Godlasky, however, was erroneous in light of the undisputed evidence as to the wide scope of his managerial authority. Our independent review discloses no material difference between the level and scope of authority held sufficient to support a finding of managing agent in *White v. Ultramar, Inc.*, *supra,* 21 Cal.4th 563 and the evidence presented below. In *White,* the relevant supervisory employee was "zone manager" Loraine Salla. "As the zone manager for Ultramar, Salla was responsible for managing eight stores, including two stores in the San Diego area, and at least sixty-five employees. The individual store managers reported to her, and Salla reported to department heads in the corporation's retail management department." (*Id.* at p. 577.)

In finding "Salla exercised substantial discretionary authority over vital aspects of Ultramar's business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy," the Supreme Court explained that she supervised 8 retail stores and 65 employees and had been "delegated most, if not all, of the responsibility for running these stores." (*White v. Ultramar, Inc.*, *supra,* 21 Cal.4th at p. 577.) Similarly, Godlasky was responsible for the day-to-day

responsibility of running approximately 25 stores and approximately 800 to 1,000 employees. Those responsibilities extended to all aspects of the stores' operations, including training. Although he could not unilaterally fire an employee, he was a necessary member of the corporate committee responsible for doing so. In contrast, Godlasky's managerial authority was far greater than that found insufficient in *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160. There, the supervisory employee was the loss prevention supervisor for a single store, who supervised only a few employees and whose discretionary power was limited to detaining and prosecuting low level offenders. (*Id.* at p. 164.)

DISPOSITION

The judgment is reversed and remanded as to Shaw's claim for sexual harassment under the FEHA, as well as for her potential entitlement to punitive damages. In all other respects, the judgment is affirmed. Costs are awarded to Shaw on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.